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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEJANDRO GALLARDO,

Defendant and Appellant.

F056856

(Super. Ct. No. F08300376)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Robert H. Oliver, Judge.

James M. Kehoe, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and Amanda D. Cary, Deputy Attorneys General, for Plaintiff and Respondent.

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*Before Cornell, Acting P.J., Dawson, J. and Hill, J.

Defendant Alejandro Gallardo contends two errors occurred after a jury found him guilty of carrying a concealed knife.

First, he argues the \$30 assessment for the construction of court facilities set forth in Government Code section 70373 (section 70373) should not have been imposed because he was convicted before the statute's effective date. We agree and will strike the assessment. (*People v. Davis* (2010) 185 Cal.App.4th 998 [§ 70373 applies only where the conviction occurs on or after its effective date; order imposing assessment reversed].)

Second, defendant asserts *Yurko* error¹—that is, the record fails to show that he knowingly and voluntarily waived his constitutional rights when he admitted a prior conviction because he had not been given the advisements described in *Boykin v. Alabama* (1969) 395 U.S. 238 (*Boykin*) and *In re Tahl* (1969) 1 Cal.3d 122 (*Tahl*). We conclude (1) this case falls within the incomplete advisement category of cases and (2) the totality of the circumstances in the record demonstrates defendant knowingly and voluntarily waived his constitutional rights when he admitted his prior.

The judgment, as modified to strike the \$30 assessment, will be affirmed.

FACTS AND PROCEEDINGS

On June 26, 2008, a deputy from the Fresno County Sheriff's Department searched defendant for weapons and contraband. At the time, defendant was on parole, a fact the deputy confirmed when he first made contact with defendant. During the search, the deputy found a kitchen knife with a fixed blade approximately six inches long in defendant's right front pocket.

A felony complaint filed the next day charged defendant with carrying a concealed dirk or dagger in violation of Penal Code section 12020, subdivision (a) and alleged that defendant was convicted of a felony in December 2004 in Los Angeles Superior Court and that conviction resulted in a prison term.

¹*In re Yurko* (1974) 10 Cal.3d 857.

On December 10, 2008, a jury found defendant guilty of carrying a concealed dirk or dagger in violation of Penal Code section 12020, subdivision (a)(4). After the jury was dismissed, defendant admitted the prior prison conviction and the parties stipulated that the conviction had occurred on July 22, 2003.

On January 9, 2009, the trial court sentenced defendant to prison for four years, which included a one-year enhancement for the prison prior. The court imposed fines and fees, including a \$30 court facilities assessment that had become effective on January 1, 2009. The trial court cited *People v. Alford* (2007) 42 Cal.4th 749 (*Alford*) to support its conclusion that the assessment could be imposed on crimes occurring before the statute's effective date without violating the prohibition against ex post facto laws.

Three days after he was sentenced, defendant filed a notice of appeal.

DISCUSSION

I. Application of \$30 Assessment in Section 70373

A. Timeline of Relevant Facts

In June 2008, defendant was arrested and charged with carrying a concealed knife.

In September 2008, the Legislature enacted the bill containing section 70373. (Stats. 2008, ch. 311, § 6.5 (Sen. Bill No. 1407).)

On December 10, 2008, a jury found defendant guilty of carrying a concealed knife in violation of Penal Code section 12020, subdivision (a)(4).

On January 1, 2009, section 70373 became effective. (*People v. Fleury* (2010) 182 Cal.App.4th 1486, 1489.)

On January 9, 2009, the trial court sentenced defendant and imposed the \$30 assessment pursuant to section 70373.

B. Statutory Language and Case Law

Section 70373, subdivision (a)(1) creates a source of funding for court facilities by providing that “an assessment shall be imposed on every conviction for a criminal offense The assessment shall be imposed in the amount of thirty dollars (\$30) for each misdemeanor or felony”

The statute does not expressly address retroactivity. Defendant argues that the imposition of the \$30 assessment against him constitutes a retroactive application of the statute, which is prohibited by Penal Code section 3. That section states: “No part of it is retroactive, unless expressly so declared.”

This appeal presents the following legal question concerning retroactivity: Are defendants who were convicted *before* section 70373’s effective date subject to the \$30 assessment? In *People v. Davis, supra*, 185 Cal.App.4th 998, the Second Appellate District addressed this specific question and concluded that the section 70373 assessment “does not apply to cases in which the defendant’s conviction, by plea or jury verdict, was rendered before the January 1, 2009 effective date of the statute.” (*Davis*, at p. 1000.) We agree. (Cf. *People v. Phillips* (2010) 186 Cal.App.4th 475 [assessment upheld where conviction occurred *after* § 70373’s effective date and criminal conduct occurred before that date]; *People v. Castillo* (2010) 182 Cal.App.4th 1410, 1413-1414 [same].)

In this case, because defendant’s conviction occurred in December 2008 before the effective date of section 70373, the imposition of the \$30 assessment was improper. Therefore, the assessment will be stricken from the judgment.

II. Yurko Error

A. Relevant Facts

After the jury was selected and before opening statements, the trial court and the attorneys discussed jury instructions. When the trial court reached CALCRIM No. 3102, which concerns prior convictions that resulted in a prison term, the following exchange took place:

“THE COURT: ... [CALCRIM No.]3102, prior—prison prior. Mr. Gallardo ... has requested his prison prior which is alleged, I believe would not be heard by the jury in their case-in-chief?

“[DEFENSE COUNSEL]: That’s correct, Your Honor.

“THE COURT: And Mr. Gallardo, you understand that will not be before the jury during their case-in-chief. Only in the event that there is a finding of guilt, then you would have the absolute right to a jury trial,

representation by counsel, right to cross-examine witnesses. Or you could, if you chose, in consultation with your client, waive a jury trial and have it heard as a court trial. Or you could, after being, again, advised of all your rights, if you wish, admit that. But that will be done as a separate portion in all events. Do you understand that and agree to that, sir?”

Appellant answered in the affirmative. A few remaining instructions were addressed, the jury returned to the courtroom, the trial court gave some general instructions to the jury, and the attorneys presented their opening statements. The deputy who discovered the knife and arrested defendant was the only witness called in the prosecution’s case. The deputy was subject to cross-examination and recross-examination by defense counsel.

After the People rested, the trial court asked defense counsel if there would be any defense case. Counsel conferred with defendant, and replied “No, Your Honor.” The trial court stated: “And you did confer with your client, so he will not be testifying.” In addition, the topic of defendant’s testimony was addressed by the trial court in the jury instructions. Using CALCRIM No. 355, the trial court told the jury that a defendant has an absolute constitutional right not to testify.

While the jury was deliberating, the trial court returned to the subject of the prior conviction:

“[THE COURT:] [Defense Counsel], I know Mr. Gallardo having been advised of his *Boykin-Tahl* rights, in the event only, obviously, of course, that there is a verdict of guilt, does Mr. Gallardo wish to have a jury trial, court trial, or wish to admit, or some other?”

“[DEFENSE COUNSEL]: Your Honor, he will be admitting the prison prior in case there is a verdict of guilty.

“THE COURT: Mr. Gallardo, is that what you wish to do?

“THE DEFENDANT: (Nods head.)”

After the jury concluded its deliberations and returned a guilty verdict, the following exchange occurred:

“THE COURT: In the Information before us in addition to Count one, there was an allegation pursuant to 667.5(b). Mr. Gallardo suffered the

following prior conviction date 12-02-04, violation of Penal Code Section 273.5, court case BA076784, Los Angeles Superior Court. Pursuant to that code section, Mr. Gallardo did not remain free of prison custody and did commit an offense resulting in a felony during the five years subsequent to the conclusion of said term. Indicating Mr. Gallardo's prior voir dire of his *Boykin-Tahl* rights and consultation with counsel, he previously indicated he wished to admit that allegation. Do you admit the allegation the Court just read to you?

"[DEFENSE COUNSEL]: Your Honor, my client will be prepared to admit it, but we would like the record to reflect that the date of conviction is mistaken on the Information. The proper date of conviction according to the abstract I have in front of me is July 22nd, 2003.

"[THE PROSECUTOR]: And that is correct, Your Honor.

"THE COURT: All right. Then the Court will interlineate on Line 2 of Page 2 a conviction date of ?

"[DEFENSE COUNSEL]: July 22nd, 2003.

"THE COURT: Same case number, charge, in Los Angeles Superior Court?

"[DEFENSE COUNSEL]: Yes.

"[THE PROSECUTOR]: Correct.

"THE COURT: That's by stipulation. All right. And Mr. Gallardo you do admit, correct?

"THE DEFENDANT: Yes."

The trial court set the matter for sentencing on January 9, 2009.

B. Standard of Review

The trial court must ensure that a defendant who wishes to admit a prior conviction first receives a *Boykin-Tahl* advisement on the defendant's rights regarding jury trial, self-incrimination, and witness confrontation. (*In re Yurko, supra*, 10 Cal.3d at p. 863.) When the *Boykin-Tahl* advisement is defective, the appellate court must remand unless the record affirmatively shows the waiver was "voluntary and intelligent under the *totality of the circumstances*." (*People v. Mosby* (2004) 33 Cal.4th 353, 360

(*Mosby*), quoting *People v. Howard* (1992) 1 Cal.4th 1132, 1175.) The entire proceeding, not just the plea colloquy, is reviewed. (*Mosby*, at p. 361.)

The California Supreme Court divides defective plea advisements into two categories: (1) silent record cases, and (2) cases of incomplete *Boykin-Tahl* advisements. (*Mosby, supra*, 33 Cal.4th at p. 361.) Cases categorized as silent record cases must be remanded by the appellate court because it cannot infer a voluntary and intelligent waiver from the record. (*Id.* at p. 362.) Conversely, cases in the incomplete advisement category can be affirmed if the record affirmatively shows voluntary and intelligent waiver. (*Id.* at p. 365; see *People v. Howard, supra*, 1 Cal.4th at p. 1180.)

1. *Silent-record cases*

“Truly silent-record cases are those that show no express advisement or waiver of the *Boykin-Tahl* rights before a defendant’s admission of a prior conviction.” (*Mosby, supra*, 33 Cal.4th at p. 361.) Included in this group are cases that have only a fleeting reference to a jury trial but no other advisement. (See *id.* at p. 362, citing *People v. Johnson* (1993) 15 Cal.App.4th 169, 177 [classifying as near-silent on advisement the phrase, “[a]ll I want to know is whether you were convicted or whether or not you want a jury trial”].)

2. *Incomplete advisement cases*

A case of incomplete advisement occurs when the defendant is advised of his or her right to a jury trial on the prior conviction allegation but not of the right to remain silent or the right to confront witnesses. (*Mosby, supra*, 33 Cal.4th at p. 363.) The jury trial advisement need not occur during the plea colloquy, as long as it is reflected elsewhere in the record. (See *id.* at pp. 362-363, citing *People v. Carroll* (1996) 47 Cal.App.4th 892 [defendant advised of right to jury in first trial, which resulted in mistrial, and asked in second trial if he wanted to waive “right to a trial”]; see *People v. Hinton* (2006) 37 Cal.4th 839, 875, fn. 12 [advisements given outside the plea colloquy].)

C. Analysis

When the trial court granted defendant's request to separate the allegations of the prison prior from the trial of the underlying offense, the trial court informed defendant of the consequences of his request and the three options available to him for addressing the allegations regarding the prison prior. The court told defendant if he was found guilty on the concealed knife charge, then he "would have the absolute right to a jury trial, representation by counsel, right to cross-examine witnesses." Defendant also was advised he could waive the jury trial and have a court trial or he could admit the prior conviction.

The fact that these advisements did not occur during the plea colloquy that occurred immediately prior to defendant's admission of the prison prior does not lead to the conclusion that defendant's waiver of his constitutional rights was not voluntary and intelligent. (*Mosby, supra*, 33 Cal.4th at pp. 362-363.)

Furthermore, the advisement defendant received when his request to bifurcate was granted was not the only advisement he was given. While the jury was deliberating, defendant was told of his options for addressing the prison prior allegation. At that time the trial court asked, in the event the jury returned a guilty verdict, "does Mr. Gallardo wish to have a jury trial, court trial, or wish to admit, or some other?" This inquiry effectively advised defendant that he had a choice concerning how to proceed and one of his options was to have a jury trial on the allegation regarding the prison prior.

Neither of the trial court's discussions with defendant about the procedures for resolving the allegation regarding the prison prior explicitly informed defendant that he had the right not to testify during any jury or court trial on the matter. The trial court's failure to mention defendant's privilege against self-incrimination is insufficient to invalidate defendant's waiver because defendant was not ignorant of this privilege. During the jury trial on the concealed knife charge, defendant chose not to testify after conferring with his attorney. In other words, he exercised his privilege against self-incrimination in that trial. In addition, shortly after he exercised that privilege, he was

told of his absolute constitutional right not to testify when he heard the trial court's instructions to the jury. These facts provide a sufficient basis for inferring that defendant was aware of his right not to testify at any trial that might have been held on the allegations concerning the prison prior.

In summary, the relevant circumstances of this case include, but are not limited to, (1) the detailed advisement defendant received at the time of bifurcation, (2) the implicit advisement of his right to a jury or court trial that defendant received while the jury was deliberating, (3) the closeness in time of these advisements and defendant's admission of the prior conviction, (4) his decision not to testify in his own defense on the concealed knife charge, and (5) the jury instructions that stated a defendant has an absolute constitutional right not to testify. Based on the totality of the circumstances of this case, we infer that defendant understood his rights at the time he admitted the prison prior and voluntarily relinquished those rights. Therefore, defendant's admission of a prior prison conviction will be upheld.

Defendant also contends that his admission of the prison prior should be overturned because he was not informed that the consequence of the admission would be the addition of one more year to his sentence. We conclude that this claim of error is forfeited because it was not raised in the trial court when defendant was sentenced to that additional year. (*People v. McClellan* (1993) 6 Cal.4th 367, 377; *People v. Walker* (1991) 54 Cal.3d 1013, 1023.)

DISPOSITION

The judgment is modified to strike the imposition of the \$30 assessment pursuant to Government Code section 70373. As modified, the judgment is affirmed.